Maryland, Inc. ("RCN");[4] the Department of the Army ("DOA"); the Maryland Office of People's Counsel ("OPC"); and the Staff of the Public Service Commission of Maryland ("Staff"). At the prehearing conference, Bell Atlantic indicated a desire to address the legal issues present in this case prior to addressing substantive issues regarding the merits of requiring Bell Atlantic to provide the platform of combined unbundled elements. However, all other parties indicated they wished to present all issues, both legal and substantive, at one hearing. Accordingly, it was determined that a single hearing would be held covering all issues raised in this dispute, with the parties pre-filing written comments which would then be presented under a legislative format during the course of the hearing.

Accordingly, the parties filed written comments and hearing was held on January 9, 1998, under the legislative format. Under the legislative format, arguments and comments were presented by panels of speakers representing each party, with questioning of the speakers only by the presiding Hearing Examiner. The parties presented argument by their respective counsel, and the following persons also appeared and provided comments or testimony in support of their party: Robert V. Falcone, Donna Carney, and Blaine Darrah on behalf of AT&T; Chet Kudtarkar and Michael Messina on behalf of MCI; Geoffrey Waldau on behalf of Staff; and Donald E. Albert and James G. Pachulsky on behalf of Bell Atlantic.

[4] KMC Telecom, Inc. ("KMC") subsequently petitioned for leave to intervene, which was granted, and was represented by the same counsel as RCN.

The comments, testimony, and arguments of all parties, both written and oral, have been carefully considered in rendering a decision in this matter.

DISCUSSION AND ANALYSIS

As noted above, the dispute in this case concerns the Petition of AT&T seeking to require Bell Atlantic to continue to offer a platform of combined network elements. AT&T, the other CLECs who have entered appearances in this proceeding (MCI, Sprint, RCN and KMC), OPC, and Staff all support the AT&T position seeking to require that Bell Atlantic continue to offer the platform. Bell Atlantic opposes the Petition and maintains that the Eighth Circuit Rehearing Decision has preempted Commission authority in this area and prohibits the Commission from granting the relief sought in the petition. Also, while this case concerns only the instant petition of AT&T seeking such relief, it is clear that the other intervening CLECs support the AT&T Petition as the resolution which will occur from this proceeding would also apply to their negotiations or interconnection agreements with Bell Atlantic, as they also desire the ability to obtain a platform of combined network elements from Bell Atlantic. Furthermore, while the ultimate issue in this case concerns the provision of the combined network elements by Bell Atlantic, the paramount dispute involved in this case concerns the legal issue regarding the Commission's

authority in this area in light of the Eighth Circuit Rehearing Decision.

With regard to this legal dispute regarding Commission authority, as noted above Bell Atlantic contends that the Eighth Circuit opinion precludes this Commission from requiring Bell to provide combined network elements. Bell Atlantic notes that that the Eighth Circuit has held that the FCC's rules requiring the provision of combined network elements "cannot be squared with" and are "contrary to" Section 251(c)(3) of the Telecommunications Act. Bell argues that this is unambiguous language that precludes the Commission from taking the action requested by AT&T and the other parties as the Commission cannot require Bell Atlantic to provide combined network elements in violation of the Act. Bell further notes that the Eighth Circuit decision discusses the distinction Congress has drawn between access to unbundled network elements and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale. The Court noted the Act provides that an incumbent local exchange carrier shall provide unbundled network elements in a manner that allows the requesting carriers to combine such elements, which the Court interpreted to invalidate the FCC requirement that the incumbent local exchange carrier provide combined network elements upon request. Rather, the Court held that the statute provides that the requesting carriers will combine the unbundled elements themselves, according to Bell.

All other parties in this case acknowledge that the Eighth Circuit reconsideration decision prohibits the FCC's rules, which required incumbent local exchange companies to offer recombined network elements to CLECs. However, AT&T and its supporting parties argue that authority under The Public Service Commission Law ("the PSC Law")[5] independently provides a basis for directing Bell Atlantic to provide the platform of combined network elements. Specifically, these parties argue that the provisions of §§ 1, 56, and 69(e) of the PSC Law provide the Commission with broad authority by which it may impose the obligation on Bell Atlantic to offer a platform of combined unbundled elements. These parties also point to numerous provisions in the Telecommunications Act which provide for the preservation and exercise of state authority, such as §§ 261(c), 601(c), 252(e)(3), and 251(d)(3). These parties further argue that the platform offers benefits to new entrants and consumers that will promote competition, and believe it is the most efficient and fastest way to ensure that the benefits of local exchange competition reach all Maryland consumers. In support of their arguments, the CLECs note the comments of AT&T witnesses Falcone and Darrah in support of their contention that it would be wasteful and inefficient to force new entrants to combine elements in collocation space, as well as demonstrating how the platform will be beneficial to the provision of local exchange service.

[5] *Md. Ann. Code*, art. 78.

In considering the arguments of the parties with respect to this dispute, it is clear that this disagreement between Bell Atlantic as an incumbent local exchange carrier and the other parties who oppose the Bell Atlantic position concerns the varying interpretations of these parties of the effect of the Eighth Circuit Rehearing Decision filed on October 14, 1997. The relevant parts of that order concern a rehearing of the Eighth Circuit's original decision,[6] wherein the Court provided the following substituted language for one subsection of the original decision:

> **f. Combination of Network Elements**
>
> We also believe that the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased by the requesting carriers on an unbundled basis, 47 C.F.R. § 51.315(c)-(f), cannot be squared with the terms of subsection 251(c)(3). The last sentence of subsection 251(c)(3) reads, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C.A. §251(c)(3) (emphasis added). This sentence unambiguously indicates that requesting carriers will combine the unbundled elements themselves. While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements. The FCC and its supporting intervenors argue that because the incumbent LECs maintain control over their networks it is necessary to force them to combine the network elements, and they believe that the

[6] *Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

> incumbent LECs would prefer to do the combining themselves to prevent the competing carriers from interfering with their networks. Despite the Commission's arguments, the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent LECs to do all of the work. Moreover, the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them.
>
> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. §51.315(b), which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis.
>
> Consequently, we vacate rule 51.315(b)-(f) as well as the affiliated discussion sections.

As noted above, Bell Atlantic argues that the Court decision is determinative of the legal dispute and precludes this Commission from directing Bell Atlantic to provide the platform of combined unbundled elements as requested by AT&T. Conversely, AT&T and the other parties contend that the Eighth

Circuit Court Rehearing Decision, which they acknowledge invalidates the FCC from requiring the recombination of network elements by an incumbent carrier, does not preclude this Commission from ordering such action under existing state authority. They argue the Court merely restricted the FCC in this area and never addressed state authority. They further note that this Commission has ordered unbundling of links and ports prior to the enactment of the Telecommunications Act.[7] They argue that if the Commission agrees that it is economically efficient and in the public interest to require Bell Atlantic to provide the platform service to the competitors, it could order such a requirement pursuant to authority under Maryland law as such authority has not been preempted by the Telecommunications Act or the Eighth Circuit decision interpreting such Act.

Upon review of the arguments of the parties, I find that the Eighth Circuit order precludes this Commission from directing Bell Atlantic to provide the platform as requested by AT&T and other parties in this case. As argued by Bell Atlantic, this issue of law was fully litigated in the Eighth Circuit, in a proceeding in which AT&T, MCI, Sprint, Bell Atlantic, and indeed this Commission, were parties. The Eighth Circuit decision constitutes a judicial interpretation of the Telecommunications Act that provides the Act itself makes a careful distinction between the provision of unbundled network elements in § 251(c)(3) and purchase at wholesale rates of incumbent telecommunications retail services under § 251(c)(4).

[7] *MFS Intelenet of Maryland, Inc.*, 85 Md. PSC 38, 53-54.

While the competitive carriers and the other parties argue that the Eighth Circuit Court decision only prohibits the FCC rule which required ILECs to provide recombined network elements and does not affect state authority under independent state law to order such action, I find the Eighth Circuit ruling is not so limited. Rather, the judicial decision provides that the Act itself does not permit such a requirement of combining network elements be placed upon incumbent local exchange companies.

In addition, while the CLECs and other supporting parties correctly point out numerous provisions of the Act allow for the preservation of state authority, these provisions contain careful language that such state actions must be consistent with the requirements of the Telecommunications Act. For example, the specific section preserving state access regulations with regard to unbundled access and which is most applicable to the instant dispute is contained in § 251(d)(3). This provision provides that the FCC shall not preclude enforcement of any regulation, order or policy of a state commission that establishes access and interconnection obligations of local exchange carriers, is consistent with the requirements of the section (i.e., § 251 regarding interconnection) and does not substantially prevent implementation of the requirements of the section and the purposes of Part II of the Act. Accordingly, a state commission may invoke regulations, orders or policies that meet the above criteria, and such policies must be consistent with the requirements of § 251. Furthermore, as interpreted by the Eighth Circuit Court, requirements with respect to unbundled

access and resale contained in §§ 251(c)(3) and (4) may not direct the incumbent to recombine network elements, as the Act itself provides that the combining of such elements is to be performed by the requesting carriers rather than the ILEC under the Eighth Circuit decision. Accordingly, any state regulation, order or policy must conform with this direction, which is now a requirement of § 251.

The competing local exchange carriers and other parties have also argued that other states have allowed parties to negotiate that the ILEC recombine the unbundled elements, and such agreements to recombine the elements have been upheld by other state commissions.[8] AT&T argues that the allowance of permissive agreements to enable the ILEC to combine elements constitutes an admission that such provision of platform combinations by the ILECs is not a violation of the Telecommunications Act, and therefore may be authorized by this Commission. However, I note that § 252(a)(1) provides that ILECs may negotiate and enter into a binding agreement with carriers "without regard to the standards set forth in Subsections (b) and (c) of Section 251." Accordingly, parties may voluntarily agree to standards that may differ from the expressed provisions of §§ 251(b) and (c), and such voluntary agreements need not conform with the Act in those respects.

In this case, Bell Atlantic argues that its agreements provide for the provision of the platform of unbundled elements

[8] Specifically, Ohio, Texas and Idaho have been cited as state commissions which have confirmed enforcement of provisions of interconnection agreements obligating the ILEC to provide the platform to the CLEC.

only because it was required by the FCC rules at the time to do so. Bell also notes that it provided such unbundled network elements only to the extent required by applicable law. According to Bell Atlantic, when the Eighth Circuit vacated the FCC rules requiring the provision of network element combinations, its commitment to provide such combinations in accordance with those rules was automatically eliminated under the express terms of the interconnection agreement, and therefore it is under no further obligation to provide such a platform. It also considers these provisions to be self-executing, and claims that no further negotiation is necessary in this respect. Bell also claims that this contract provision differs from those offered in other states where an obligation under interconnection agreements was voluntarily entered into by incumbent local exchange carriers to provide such recombination of unbundled elements. Therefore, instances where the local commissions have upheld the duty to provide combined unbundled elements under the voluntary agreements are not applicable to the instant dispute, according to Bell.

AT&T further argues that other provisions of the contract provide that in the event that any legally binding legislative, regulatory, judicial or other legal action materially affects any material terms of this agreement, the party may on 30 days written notice require that such terms be renegotiated, and the parties shall renegotiate in good faith such mutually acceptable new terms as may be required.[9]

[9] Paragraph 31-5 of August 5, 1997 Bell Atlantic-AT&T agreement.

Accordingly, AT&T believes that this matter is subject to the renegotiations provisions of the contract, although AT&T acknowledges that it believes renegotiations will be fruitless.

Based on the record of this case, I find that the interconnection agreement entered into by AT&T and Bell Atlantic did provide for Bell Atlantic to provide combinations of unbundled elements.[10] Reviewing the record in this case, I find the Eighth Circuit Rehearing Decision constitutes such an event as contemplated by ¶ 31.5 of the agreement to allow modification of the contract, and it appears that such renegotiation provision should be invoked at least to the extent that the platform of combined elements has already been offered and relied upon by AT&T in any specific offices. While Bell Atlantic believes the terms of the agreement allow for the unilateral change in the agreement as the platform was offered "only to the extent required by applicable law," I believe a full reading of the contract provides that renegotiation would be necessary to the extent any offices have been established that rely upon the platform, and the provisions of ¶ 31.5 would then apply. Accordingly, I find that Bell Atlantic cannot unilaterally dismantle any such offices that provide a platform of unbundled elements at this time, but must engage in the good faith negotiations provided in the contract agreement.

As I have found that this Commission does not have authority to direct Bell Atlantic to provide the platform of

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[10] See, for example, Attachment 2 to the agreement regarding network elements, wherein Paragraph 2.4 provides that Bell Atlantic shall offer each network element individually and in combinations where technically feasible and to the extent required by applicable law.

unbundled elements in light of the Eighth Circuit decision, the substantial comment and argument of the parties with regard to the merits of Bell Atlantic's platform is now effectively moot. However, I would note that there was a clear consensus among the parties, with the exception of Bell Atlantic, that the provision of the platform provides lower rates, greater potential efficiencies, and would encourage the competing local exchange carriers to engage in local markets compared to the alternatives. I note that the absence of the Bell Atlantic platform may well result in competing local exchange carriers purchasing unbundled elements under the resale provisions of § 251(c)(4) at wholesale rates, which purchases would be more expensive than purchase of the platform of combined unbundled elements. Alternatively, such competing local exchange carriers may build their own facilities or engage in collocation arrangements that include the combining of unbundled elements themselves under the Eighth Circuit order. In the event the Eighth Circuit order is overturned, or other authority is obtained to direct Bell Atlantic to provide the platform, I recommend that this issue be revisited at such time for consideration of directing Bell Atlantic to provide the platform or similar arrangements.

CONCLUSION

The paramount issue in this case concerns Commission authority to direct Bell Atlantic to provide the platform of unbundled elements to competing local exchange carriers. In the

Rehearing Decision of the Eighth Circuit Court of Appeals, issued on October 14, 1997, the Eighth Circuit has interpreted § 251(c)(3) of the Telecommunications Act to provide that the Act does not allow directing incumbent local exchange carriers to do the actual combining of unbundled elements. Rather, the Court determined that the Telecommunications Act requires incumbent local exchange carriers to provide elements in a manner that enables the competing carriers to combine them, but cannot be read to levy a duty on the incumbent local exchange companies to do the actual combining themselves of unbundled elements. The parties engaged in the dispute before this Commission, Bell Atlantic and AT&T, are also parties to the dispute before the Eighth Circuit, and I find that the dispute regarding the interpretation of the Act among these parties has been previously litigated under the jurisdiction of the Eighth Circuit. Furthermore, I find that the Court's decision is not limited only to vacating the FCC rule, but involves interpretation of the Act itself and effectively also precludes state commissions from directing such action by ILECs that would contravene the Act.

As the Act has now been interpreted to prohibit direction of ILECs with respect to offering rebundling, I find that this Commission is also precluded from similarly directing Bell Atlantic to combine unbundled elements as such a directive would be contrary to the Telecommunications Act. In this regard, I find that any state directives or policy in this area must conform to the Telecommunications Act, and the Commission

is precluded from directing the offering of a platform pursuant to the Eighth Circuit Court decision. In addition, I find that to the extent Bell Atlantic has in fact agreed to provide such unbundled elements on a combined basis in its interconnection agreement with AT&T, it must now engage in the renegotiation provisions of the interconnection agreement to negotiate the status of any such offerings that have been made and relied upon by AT&T rather than unilaterally changing the arrangements as contemplated by Bell Atlantic.

Finally, in light of the expedited nature of this case, any party appealing this Proposed Order shall simultaneously file the memorandum on appeal with the notice of appeal. Accordingly, the provisions of COMAR 20.07.02.13 are waived to the extent that they permit the memorandum to be filed subsequent to the notice of appeal.

IT IS, THEREFORE, this 16th day of January, in the year Nineteen Hundred and Ninety-eight,

ORDERED: (1) That the Petition of AT&T Communications of Maryland, Inc., seeking to require Bell Atlantic-Maryland, Inc., to offer a platform of combined network elements is hereby denied in accordance with the findings of this Order.

(2) That Bell Atlantic-Maryland, Inc. must invoke the renegotiation provisions of the contract in the event that it wishes to revise arrangements for the platform of unbundled elements that have been implemented pursuant to the interconnection agreement with AT&T Communications of Maryland, Inc.

(3) That any party appealing this Proposed Order shall file the memorandum on appeal simultaneously with the notice of appeal.

(4) That this Proposed Order will become a final Order of the Commission on February 18, 1998, unless before that date an appeal is noted with the Commission by any party to this proceeding as provided in Section 20(c) of The Public Service Commission Law, or the Commission modifies or reverses the Proposed Order or initiates further proceedings in this matter as provided in Section 86(d) of The Public Service Commission Law.

Joel M. Bright
Hearing Examiner
Public Service Commission of Maryland

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PETITION OF BELL ATLANTIC - PENNSYLVANIA, INC.	:	
For a Determination of Whether the Provision of Business Telecommunications Services Is Competitive Under Chapter 30 of the Public Utility Code	:	Docket No. P-00971307

RECOMMENDED DECISION

THIS DOCUMENT CONTAINS PROPRIETARY MATERIAL

Before
Michael C. Schnierle
Administrative Law Judge

July 24, 1998

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265
ISSUED: July 28, 1998

IN REPLY PLEASE
REFER TO OUR FILE
P-00971307

ALAN KOHLER
& DANIEL CLEARFIELD ESQS
WOLF BLOCK SHORR & SOLIS- COHEN
LOCUST COURT BLDG SUITE 300
212 LOCUST STREET
HARRISBURG PA 17101

PETITION OF BELL ATLANTIC-PENNSYLVANIA, INC.
For a Determination of Whether the Provision of Business Telecommunications
Services Is Competitive Under Chapter 30 of the Public Utility Code

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Recommended Decision of Administrative Law Judge Michael C. Schnierle.

An original and nine (9) copies of signed exceptions to the decision, if any, MUST BE FILED WITH THE SECRETARY OF THE COMMISSION IN ROOM B-20, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265; a copy in the hands of the Office of Special Assistants, Room 210; and a copy in the hands of each party of record no later than August 7, 1998 by 4:30 P.M. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions or reply exceptions.

Replies to exceptions, if any, must be served on the Secretary of the Commission, in the manner described above, no later than August 14, 1998 by 4:30 P.M. as well as served upon the parties. A certificate of service shall be attached to the filed exceptions.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535, particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should be clearly labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

Any reference to specific sections of the Administrative Law Judge's Recommended Decision shall include the page number(s) of the cited section of the decision.

Parties are also requested to provide the Commission's Office of Special Assistants with a copy of exceptions/reply exceptions on a computer disk, 3 1/2" in size, in Microsoft Word 6.0 format. If Word 6.0 is not available, either Wordperfect 5.1 or ASCII format is acceptable.

Very truly yours,

law
Encls.
Certified Mail
Receipt Requested

James J. McNulty
Secretary

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HISTORY OF THE PROCEEDING

Bell Atlantic-Pennsylvania, Inc. ("BA-PA") filed this Petition for a Determination that Provision of Business Telecommunications Services is a Competitive Service Under Chapter 30 of the Public Utility Code on December 16, 1997. Several parties filed answers and motions to intervene, including the Office of Consumer Advocate ("OCA"), the Office of Small Business Advocate ("OSBA"), the Office of Trial Staff ("OTS"), AT&T Communications of Pennsylvania, Inc. ("AT&T"), MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively "MCI"), Teleport Communications Group ("TCG"), Sprint Communications Company L.P. ("Sprint"), ATX Telecommunications Services, Ltd. ("ATX"), the Central Atlantic Payphone Association ("CAPA"), Commonwealth Telecom Services, Inc. ("CTSI"), the Pennsylvania Cable & Telecommunications Association ("PCTA"), the Internet Service Providers ("ISP"), Connectiv Communications, Inc., and Sprint Communications Company L.P.

AT&T filed a motion to dismiss BA-PA's petition on January 5, 1998 due to the broad nature of BA-PA's petition. On January 5, 1998, CAPA filed a partial motion to dismiss the section of BA-PA's Petition which requested competitive classification of Payphone Network Services. BA-PA filed an answer to both motions to dismiss on January 15, 1998.

A prehearing conference was held in this case on February 5, 1998. During the conference, I denied AT&T's and

CAPA's motions to dismiss. Also, a schedule was established based on a 270 day time frame.[1]

On February 11, 1998, BA-PA filed its written direct testimony.

On February 12, 1998, BA-PA filed a petition for Commission review and answer to a material question in an attempt to have the Commission require that the case be heard within 180 days rather than 270 days. On February 19, 1998, several parties filed responses opposing BA-PA's petition, including MCI, AT&T, CAPA and OCA. On March 30, 1998, the Commission issued an Order finding that 180 day time limit in 66 Pa.C.S. §3005(a) for concluding a Petition is directory and not mandatory. Accordingly, the Commission ordered that the parties proceed in accordance with the schedule set forth in my Second Prehearing Order of February 20, 1998.

On March 3, 1998, BA-PA applied to me for subpoenas to either take depositions or for the production of documents to be served on all non-party Competitive Local Exchange Companies ("CLECs"). The purpose of the subpoenas was to permit BA-PA to obtain evidence regarding the presence and viability of other competitors (for business telecommunications services), including market shares, the availability of like or substitute services, the relevant geographic area, and the ability of other entities to offer services or activities at competitive prices, terms and conditions. (Application at ¶¶ 3-4). Through a series of three

[1] The schedule and decision regarding the motions to dismiss were included in my Second Prehearing Order of February 20, 1998.

orders, I approved BA-PA's request for subpoenas, with the exception of 11 names withdrawn by BA-PA and one or more CLECs which provided BA-PA with information without the subpoena.

All other parties filed their direct testimony on March 27, 1998. BA-PA filed rebuttal testimony on May 6, 1998. Other parties filed surrebuttal testimony or outlines of oral surrebuttal testimony between May 15 and May 20, 1998. BA-PA filed outlines of oral surrejoinder testimony on May 26, 1998.

Public input hearings were held in Williamsport on March 16, 1998 and in Scranton on March 17, 1998. Thirteen individuals representing businesses, schools, local agencies or associations testified regarding BA-PA's Petition.

Hearings were held on May 27-29 and June 1-2. Overall, twenty witnesses were presented by several parties, including five witnesses for Bell Atlantic, four witnesses each for MCI and AT&T, two witnesses for TCG, and one witness each for OTS, OSBA, OCA, CAPA, and CTSI. The hearings resulted in a transcript of 1,708 pages of oral testimony; 83 exhibits, including statements of written testimony were admitted into the record.

DISCUSSION

I. Introduction.

By this petition, BA-PA seeks to have the Commission declare competitive all telecommunications services provided to businesses throughout BA-PA's service territory. This would have the effect of eliminating most regulatory oversight of 84 separate services that are identified in BA-PA St. 1, Appendix B.

Under BA-PA's view of the case, if this petition is granted, with respect to each of these services, BA-PA will be allowed to raise or lower rates as it desires. BA-PA may also impose new terms and conditions on the use of these services, or may discontinue offering these services. (Tr. 429-431, 462). BA-PA proposes to meet the imputation test of Chapter 30 by aggregating the revenues for all of these services. That is, a proposed rate for a deregulated BA-PA business service would pass the imputation test as long as the revenues for all business services exceed the revenues that BA-PA would realize from the sale of the associated basic service functions to its competitors. Thus, BA-PA would be free to offer some services at below cost as long as others were priced above cost. According to BA-PA, even a price of zero on a specific service would not flunk this test. (Tr. 339).

When I first saw BA-PA's petition in this case, I was surprised. It seemed to describe a telecommunications market with which I am completely unfamiliar after hearing many cases, over the past two and one-half years, that specifically relate to telecommunications deregulation and competition. I could not begin to imagine how BA-PA planned to establish that all business telecommunications services are competitive throughout its entire service territory. I expressed that opinion to the parties during the prehearing conference. (Tr. 15-16).

Having now presided over this case from the prehearing conference through briefing, I conclude that BA-PA has not come close to establishing the major fact that it must establish to prevail here, namely, that there is effective competition for

business services throughout BA-PA's service territory such that BA-PA would be unable to sustain price increases for its services. BA-PA's presentation on the issue of competitive presence does not withstand even the most cursory review. For this reason, I recommend denying this petition.

I also urged BA-PA to present evidence in support of partial relief (i.e., a grant of competitive status limited to certain services, customers, or geographic areas). (Tr. 17-18). BA-PA has not made such a presentation. As will be discussed further, BA-PA is now asking for partial relief based on certain record evidence, if full relief is not granted. For reasons that I will discuss, I also recommend that partial relief not be granted here.

Because I believe that BA-PA has failed to establish the primary fact that it needs to establish, I will not discuss in minute detail every argument made by the parties. I will, however, attempt to touch on more important issues that may be revisited in other cases in the future.

One other point is worth mentioning here. BA-PA's petition has one attractive feature. It presents an opportunity to bring about politically unpopular, but economically necessary, rate rebalancing under the guise of promoting competition. While this result may have something to recommend it, conditions in Pennsylvania are such that granting the petition now is likely to result in almost immediate rate rebalancing, but very little competition (which <u>might</u> serve to restrain rural rates) any time soon.

II. The Statutory Criteria.

This proceeding is governed by 66 Pa.C.S. §3005, which provides:

> (a) Identification of competitive service.--The commission is authorized to determine, after notice and hearing, whether a telecommunications service or other service or business activity offered by a local exchange company is a competitive service. A local exchange telecommunications company may petition the commission for a determination of whether a telecommunications service or other service or business activity offered is competitive, either in conjunction with a petition to be regulated under an alternative form of regulation or at any time after the granting of the petition. . . . In making the determination, the commission shall consider all relevant evidence submitted to it including evidence presented by providers of competitive services. In a proceeding to determine whether a telecommunications service or other service or business activity offered is a competitive service, the following shall apply:
>
> (1) The commission shall make findings which, at a minimum, shall include evidence of ease of market entry, including the existence and impact of cross-subsidization, rights-of-way, pole attachments and unavoided costs; presence and viability of other competitors, including market shares; the ability of competitors to offer those services or other activities at competitive prices, terms and conditions; the availability of like or substitute services or other activities in the relevant geographic area; the effect, if any, on protected services; the overall impact of the proposed regulatory changes on the continued availability of existing services; whether the consumers of the service would receive an identifiable benefit from the provision of the service or other activity on a competitive basis; the degree of regulation necessary to prevent abuses or discrimination in the provision of the service or other activity and any other relevant factors which are in the public interest. . . .

> (2) The burden of proving that a telecommunications service or other service or business activity offered is competitive rests on the party seeking to have the service classified as competitive.
>
> . . . .
>
> (e) Additional Determinations.--The commission shall determine whether local exchange telecommunications companies are complying with the following provisions:
>
> (1) The local exchange telecommunications company shall unbundle each basic service function on which the competitive service depends and shall make the basic service functions separately available to any customer under nondiscriminatory tariffed terms and conditions, including price, that are identical to those used by the local exchange telecommunications company and its affiliates in providing its competitive service.
>
> (2) The price which a local exchange telecommunications company charges for a competitive service shall not be less than the rates charged to others for any basic service functions used by the local exchange telecommunications company or its affiliates to provide the competitive service. Revenues from the rates for access services reflected in the price of competitive services shall be included in the total revenues produced by the noncompetitive services.

Thus, before any other issues may be addressed, it is first necessary to determine if the record supports findings favorable to BA-PA for each of the following criteria:

> 1. Ease of market entry, including the existence and impact of cross-subsidization, rights-of-way, pole attachments and unavoided costs;
>
> 2. Presence and viability of other competitors, including market shares;
>
> 3. The ability of competitors to offer those services or other activities at competitive prices, terms and conditions;